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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1184

ALLAN HOLLOWAY and
ALLEN E. PERKINS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRANK J. PETRELLA
1515 First National Bank Tower
2 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 688-0440
Attorney for Petitioner

Washington, D.C. • THIEL PRESS • (202) 638-4521

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Petitioners Allan Holloway and Allen E. Perkins respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on October 18, 1979.

OPINION BELOW

The panel opinion of the Court of Appeals was reported at 604 F.2d 961 (5th Cir. 1979), and is attached as Appendix "A," *infra.*

JURISDICTION

The judgment of the Court of Appeals was entered on October 18, 1979. A timely petition for rehearing and rehearing *en banc* was denied without opinion on January 2, 1980. A copy of the letter informing Petitioners that the petition for rehearing and rehearing *en banc* was denied is attached as Appendix "B," *infra.* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Were Petitioners' right to jury trial, guaranteed by the Sixth Amendment to the United States Constitution and Rule 24(c) of the Federal Rules of Criminal Procedure, violated by the trial court's excusal of two jurors?

II. Were Petitioners' Fifth Amentment rights to trial pursuant to an indictment returned by a grand jury abridged by the court's striking of the words "aiding and abetting by each other and others"?

STATUTES INVOLVED

Fifth Amendment to the United States Constitution:

> . . . No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of the grand jury.

Rule 24(c), Federal Rules of Criminal Procedure:

> . . . Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable to disqualified to perform their duties. . . .

STATEMENT OF THE CASE

Allan Holloway and Allen Perkins, Petitioners, were charged in January, 1973, in a thirty-three count indictment alleging Petitioners and four co-defendants with thirty-two counts of mail fraud[1] and one count of conspiracy.[2] Trial began June 10, 1974. Following the nin-week jury trial, Petitioner Holloway was convicted of twenty-five counts of mail fraud; Petitioner Perkins was convicted of one count of mail fraud.[3] Motions for new trial were timely filed. Due to transcription delays in preparation of the fifty-volume record, amended motions for new trial were not filed until mid-June, 1976. Evidentiary hearings on the motion were conducted in February, 1977. On April 14, 1977, Petitioners' motion for new trial was granted and a retrial date was set. A copy of this order is attached as Appendix "C." The district court later vacated this order and denied Petitioners' motion for new trial on October 26, 1977. *See* Appendix "D," *infra.*

A panel decision was rendered by the Fifth Circuit on October 18, 1979. *Inter alia,* the opinion held that a verdict returned by only eleven jurors did not constitute reversible error; excusal during trial of two jurors by the court for reasons which were not inquired into by Respondent during voir dire was not error; a *Mann*-charge[4] did not violate the burden-shifting prohibitions

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[1] 18 U.S.C. § 1341.

[2] 18 U.S.C. § 371.

[3] Co-Petitioner Stanley Spiegel was found guilty of thirty counts of mail fraud. The jury acquitted all petitioners of the conspiracy count. Two co-defendants were acquitted of all charges.

[4] *Mann v. United States,* 319 F.2d 404 (5th Cir. 1963), *cert. denied,* 375 U.S. 986 (1964).

of *Mullaney v. Wilbur,* 421 U.S. 604 (1975), and *Sandstrom v. Montana,* ___ U.S. ___, 99 S.Ct. 2450 (1979); and the trial court retained jurisdiction to sentence Petitioners even though a previously-granted motion for new trial was vacated. Petitioners' application for rehearing *en banc* was denied without opinion on January 2, 1980.

Co-Petitioner Stanley Spiegel has filed a petition for writ of certiorari and has raised the eleven juror, *Mann*-charge and jurisdiction to sentence issues. In the interest of judicial economy, Petitioners adopt these issues rather than give them repetitive treatment in this petition.

REASONS FOR GRANTING THE WRIT

I.

PETITIONERS' RIGHTS TO JURY TRIAL GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND RULE 24(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE WERE VIOLATED BY THE TRIAL COURT'S EXCUSAL OF TWO JURORS.

On June 10, 1974, the instant jury was empaneled following extensive voir dire. No inquiry was made of the venire concerning knowledge or acquaintanceship of any defendant or his family. Prior to the commencement of any proceedings on June 11th, the court announced that it had received information that one of the jurors knew co-Petitioner Spiegel. Counsel for Respondent did not request further inquiry by the court at that time and the trial began. Two jurors were subsequently excused by the court over Petitioners' objection on June 13th due to their relationship and acquaintance with Spiegel's children while classmates in junior high school and college. Juror McSwain was excused, although the

record clearly reflects her statement that, in spite of her knowledge, she "could be fair in making a judgment; that [she] was just kind of uncomfortable." Juror Jones, unaware of any relationship between a college acquaintance "Leslie" and co-Petitioner Spiegel until he saw Leslie sit in the courtroom, clearly stated his jury service would not be affected by his knowledge of Spiegel's daughter. The record fails to reflect that either of these jurors intimated knowledge or acquaintanceship with any defendant other than Spiegel. As to Petitioners Holloway and Perkins, excusal of these two jurors violated their Sixth Amendment and Rule 24(c) protections.

In addressing the juror excusal issue, the Fifth Circuit found Rule 24(c) of the Federal Rules of Criminal Procedure to be dispositive of Petitioners' contentions; *e.g.,* the trial court was empowered to remove the two jurors when facts were presented which convinced the judge that the jurors were unable to perform their duties.[5] The panel recognized that no case cited dealt with the situation presented by Juror McSwain, namely, excusal of an empaneled juror during trial for cause based upon facts which would have become apparent during voir dire except for the omission of questioning by Respondent. Finding that Rule 24(c) did not specifically require the retention of jurors under these circumstances,

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[5] Disposition of the issue of excusal of Jurors McSwain and Jones was couched only in terms of Rule 24(c) of the Federal Rules of Criminal Procedure. Also Petitioners presented a Sixth Amendment violation of right to jury trial. *See, Patton v. United States,* 281 U.S. 276 (1930). In such a light, the panel erroneously placed the burden of showing prejudice upon Petitioners. Correctly, the burden of proving harmless error beyond a reasonable doubt should have been placed upon Respondent. *See, Chapman v. California,* 386 U.S. 18 (1967). In this regard, Respondent has failed to carry its burden.

the Fifth Circuit stated, ". . . we believe precedent indicates that the trial judge's discretion is broad enough to cover this case." *Spiegel, supra,* at 967.

All cases cited in the panel opinion related to excusal of jurors who had been affected by extrinsic factors. *See, United States v. Jones,* 534 F.2d 1344 (9th Cir. 1976) [juror intoxicated during trial]; *United States v. Smith,* 550 F.2d 277 (5th Cir. 1977) [two jurors sleeping; two jurors tampered]; *United States v. Brown,* 571 F.2d 980 (6th Cir. 1978) [juror developed serious marital problems during trial]; *United States v. Domenech,* 476 F.2d 1229 (2d Cir. 1973) [juror late for instructions to jury]. In the instant case, an intrinsic factor, *i.e.*, the relationship of Juror McSwain, existed prior to the selection of the jury, and would have been known except for the omission of Respondent to properly voir dire the panel or develop the matter prior to the opening of trial on June 13th.

In an oft-cited case of the Third Circuit, it was noted that a party to an appeal "appear[ed] to lose sight of the fact that the challenge of a juror for cause may be waived by the accused and the prosecutor." *United States v. Goldberg,* 330 F.2d 30, 43 (3rd Cir. 1964). Such a waiver developed in the instant case when Appellee failed to inquire of the jury at voir dire.[6] This was reinforced when Respondent failed to seek the excusal of McSwain when the matter first came to light prior to the commencement of trial proceedings on June 13th. Under the circumstances, the dismissal of McSwain constituted a showing of bias towards Petitioners. Absent any

[6]To this end, a conflict exists between *Goldberg* and *Spiegel* and certiorari is necessary to assure uniformity of decision within these circuits.

affirmative action on the part of Respondent, the court should have found Respondent's conduct to constitute a waiver or bar of any grievance later voiced by Respondent. To *sua sponte* act where action was not required and in fact was barred constituted an abuse of discretionary power by the trial court. Such action is a precedent-setting error of exceptional public importance which requires invocation of the supervisory powers of this Court. As it currently exists, the approval by the panel of the trial court's action seriously affects the public perception of the judicial system. Prevention of even the possibility of unfairness has been the continuous endeavor of our system of law. *See, In re Murchison,* 349 U.S. 133 (1955). As applied to Petitioners, the action of the trial court did not carry such a safeguard. Petitioners must further note that nowhere in the panel opinion on this issue are their names mentioned. Excusal of the two jurors became an issue only because of the underlying relationships to co-Petitioner Spiegel. In this joint trial where severance had been requested and denied, Petitioners were put in a position of increased hardship.

Judge Gee, speaking for the Fifth Circuit, further concluded that Petitioners could not show prejudice as a result of the substitution. To the contrary, due to the excusal of two jurors and the subsequent illness of an additional member of the jury, Petitioners were ultimately convicted by a jury of less than twelve. As Petitioner Perkins pointedly reflected during the post-trial evidentiary hearings in this case, he viewed the loss of one of the jurors as a loss of one more chance for acquittal, the lost juror being one more citizen of the community to whom the Government needed to prove its case beyond a reasonable doubt.

Petitioners had a valued right to be tried by the original twelve jurors selected to decide the issue of their innocence or guilt, and as criminal defendants had a "valued right to have his trial completed by a particular tribunal." *United States v. Jorn*, 400 U.S. 470, 484 (1971). Based upon the theory that jurors represent a careful selection by counsel, and are not fungible but individual entities, replacement of the two jurors under the instant circumstances prejudiced Petitioners. Two jurors selected by trial counsel for Petitioners were removed due to no fault of theirs, albeit their joint trial with Spiegel. The action of the trial court vitiated the careful consideration of counsel in exercising joint peremptory challenges. Jurors are indeed non-fungible in nature, and in the instant case, fungibility, if allowed to stand, caused Petitioners to forfeit their valued right not only to trial by the original twelve, but by twelve at all.

Certiorari should be granted to review this precedent-setting error of novel impression and resolve the conflict in the Fifth and Third Circuits.

II.

PETITIONERS' FIFTH AMENDMENT RIGHTS TO TRIAL PURSUANT TO AN INDICTMENT RETURNED BY A GRAND JURY WERE ABRIDGED BY THE COURT'S STRIKING OF THE WORDS "AIDING AND ABETTING BY EACH OTHER AND OTHERS."

Following the submission of the case for consideration by the jury, a series of questions were addressed to the trial court relating to co-schemer liability and the meaning of the term "aiding and abetting." After discussions with counsel, the court recharged the jury that they were to consider the mail fraud counts "as

if the language 'aiding and abetting' was not in it." No exception to the charge was taken. Deliberations resumed, and Petitioners were acquitted of conspiracy, but convicted of various mail fraud counts.

The Fifth Amendment of the United States Constitution provides, *inter alia:*

> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of the grand jury.

Beginning with its watershed decision of *Ex Parte Bain*, 121 U.S. 1 (1886), this Court has mandated:

> *The party can only be tried upon the indictment as found by such grand jury,* and especially upon *all* its language found in the charging part of the instrument. . . . *And how can it be said that, with these words stricken out, it is the indictment which was found by the grand jury?* If it lies within the province of a court to change the charging part of an indictment to suit its own notions of *what it ought to have been,* or what the grand jury would *probably have made it if their attention had been called to suggest the changes,* the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed. [Emphasis added.] At 9-10.

Only upon motion of a defendant may a court strike surplusage from an indictment or information. Rule 7(d), Federal Rules of Criminal Procedure.[7] The jury's

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[7]Petitioners did not move to strike the words "aiding and abetting" from the indictment as it related to counts one through

[footnote continued]

original question inquired as to whether all members of a conspiracy were guilty of acts performed by any one member of a conspiracy. Questioning by the court revealed that the jury's question actually related to the mail fraud counts. The record thus clearly indicates that the jurors were *equating* the charge the court had previously given them on the definition of "conspiracy" in count thirty-three with that of "aiding and abetting" as used in count one through thirty-two. Since the jury ultimately acquitted Petitioners of count thirty-three [the conspiracy count], it cannot be said that the court's amendment of the indictment, by striking the words "aiding and abetting" was not prejudicial to Petitioners. If the jury had continued to consider the "aiding and abetting" verbiage of the indictment, the same conclusion of innocence on counts one through thirty-two would have been reached as was reached on count thirty-three.

During colloquy between the court and counsel on the decision to recharge the jury, the court expressed some dismay that the words "aiding and abetting" had been used in the mail fraud counts. The Assistant United States Attorney filed his disclaimer stating, "Your Honor, I did not draw that indictment, I am not going to take the heat." The court volunteered, "I know why it's in there, I think. It's a darn good catch-all, but I think that's what it's there for. Its real reason."[8] A verdict

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thirty-two. While counsel for Petitioners did not object to the recharge of the court, a waiver could not be had without the intelligent, knowing and intentional waiver of Appellants themselves. On this issue, the record is silent.

[8]In this regard, *see United States v. Radetsky*, 535 F.2d 556, 562 (10th Cir. 1976):

> It is this fundamental guaranty to be tried only on charges made by a grand jury that mainly concerns us. The substantial safeguard of the guaranty to those charged with serious crimes cannot be eradicated under the claim that variations are mere technical departures from the rules.

based upon an indictment impermissibly amended cannot be constitutionally upheld. Redrafting of the instant indictment resulted from the re-charge of the jury. Such a procedure clearly violated the proscriptions of *Bain, supra.* To hold otherwise is to obviate the full panorama of Fifth Amendment protections to which Petitioners were entitled.

CONCLUSION

For the foregoing reasons, Petitioners pray that their petition for a writ of certiorari be granted.

Respectfully submitted,

FRANK J. PETRELLA
1515 First National Bank Tower
2 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 688-0440
Attorney for Petitioner

This, the first day of February, 1980.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 78-5110

Oct. 18, 1979

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

STANLEY SPIEGEL, ALLEN E. PERKINS
and ALLAN HOLLOWAY,
Defendants-Appellants.

Defendants were convicted in the United States District Court for the Northern District of Georgia, Charles A. Moye, Jr., J., of various counts of mail fraud and conspiracy, and they appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) jury verdicts of mail fraud were supported by substantial evidence; (2) trial court did not commit reversible error by excusing a juror and continuing trial with only 11 jurors; (3) defense failed to show prejudice to them in trial court's action in dismissing two jurors during trial and replacing them with alternates when it was learned that the jurors knew one of the defendant's families, an issue which Government's voir dire failed to inquire about; (4) error made by trial court in giving erroneous *Mann* instruction to jury was not plain error; (5) trial court had jurisdiction to reconsider its grant of new trial to defendants and subsequently deny new trial and impose sentences, and (6) trial court's grant, and then denial,

of motion for new trial was not an abuse of discretion and did not violate Speedy Trial Act.

Affirmed.

Appeals from the United States District Court for the Northern District of Georgia.

Before GODBOLD, GEE and RUBIN, Circuit Judges.

GEE, Circuit Judge:

Appellants were indicted and tried on 30 counts[1] of mail fraud under 18 U.S.C. § 1341, and one conspiracy count under 18 U.S.C. § 371. Following a trial lasting nine weeks, the jury found appellant Stanley Spiegel guilty of all 30 counts of mail fraud. Appellant Allan Holloway was found guilty of 25 counts of mail fraud; and appellant Allen Perkins was found guilty of one count of mail fraud and acquitted of all others. The jury acquitted all three of the conspiracy charges and acquitted two codefendants of all charges. Spiegel, Holloway, and Perkins appeal from their convictions. Appellant Spiegel's brief argues for reversal on 24 separate issues; the brief for Holloway and Perkins raises 15 issues. The transcript of proceedings in the trial court fills over 50 volumes. We granted additional time for oral argument and gave permission to file briefs more lengthy than usual.

It should be obvious that this is a complex case. Any summary of facts will be less revealing than an iceberg's proverbial tip. With that disclaimer, we now attempt to sketch the most important details while saving for our discussion of the more troubling issues a description of the events especially relevant to them.

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[1] The indictment alleged 32 counts; two were dismissed at the close of the government's case-in-chief.

Appellant Spiegel, a successful acquisition broker, bought the controlling interest in Coliseum Properties, Inc. (CPI) in October 1970 with notes totalling approximately $460,000. Spiegel and Holloway soon thereafter formed Leasing Corporation of America (LCA) as a CPI subsidiary. At about the same time, Spiegel and acquitted codefendant Joseph Lawson formed another CPI subsidiary, Auditing Services, Inc. (ASI). Holloway, through Holloway Enterprises, Inc. (HEI), contracted with CPI to sell franchises for both ASI and LCA.

LCA offered franchises to persons interested in entering the leasing business. Essentially, prospective dealers were told that LCA had access to 200 funding sources and could obtain financing for leases on almost any type of income-producing equipment, even on marginal lease applications. The sales pitch to prospective dealers furnished, amid other questionable information, the names and phone numbers of allegedly successful dealers. Franchise salesmen solicited a $2,500 down payment with a completed dealer application. Following approval of the application, the remainder of the $10,000 franchise fee became due. Dealers who paid in full received, by mail from Spiegel, a signed dealer agreement. A total of 34 LCA franchises were sold between December 1970 and December 1971; LCA received $365,000 in cash from those sales under its agreement with HEI that LCA and HEI would split the fees 60/40. Over 130 leases were submitted to LCA by dealers during 1971. Only four were placed successfully.

ASI offered computerized audits of utility expenses to businesses and industries. It sold franchises allowing solicitation of customer accounts in defined territories. Prospective dealers were told that utility rates from each dealer territory were programmed into the computer and

that auditing by computer was the major advantage offered by ASI. Businesses for whom audits were done were to pay 50 percent of any refunds or utility savings to the dealer, who then was to share half his profits with ASI. To aid its franchise sales, ASI used photographs of computer facilities depicting an RCA computer and, later, tours of another facility. As with LCA sales, prospects were furnished the names and addresses of purportedly successful dealers. ASI received over $650,000 as its share of the fees from 62 franchise sales in 1971; HEI received over $225,000. Franchisees submitted many auditing contracts, but few recoveries resulted, although ASI had represented that the recovery rate would be very high.

Appellant Perkins was a paid "singer" for both LCA and ASI; *i.e.*, he posed as a successful dealer and deceived prospective dealers by representing that he was receiving significant income from his "franchises." Spiegel and Holloway were aware of the use of "singers."

Evidence showed that LCA misrepresented the extent of its funding sources. Holloway prepared the LCA pitch book in Spiegel's presence, and Spiegel had ample opportunity to learn its contents. Spiegel confirmed, in a telephone call to a prospective dealer, that LCA could handle marginal paper and had 200 funding sources. Additionally, Spiegel sent backdated franchise agreements to "singers" Perkins and Jim Arnold knowing that no fees had been paid for their "franchises."

Spiegel and Holloway misrepresented the state of ASI's computer capability. Their computer expert told Spiegel in April 1971 that the rate structure of an entire utility company could not be programmed; analysis had to proceed one business at a time. When advised of this and when told such information would ruin the sales pitch,

Spiegel indicated that ASI salesmen need not receive this information. Despite advice that franchise sales should stop, owing to a backlog at the computer, sales continued. Spiegel also misrepresented to a dealer that ASI had leased three-fourths of the time available on an RCA computer at an annual cost of $500,000.

From the foregoing and other facts proven at trial, we think it clear that the jury verdicts of fraud are supported by substantial evidence. We now proceed to consider the more serious points raised on appeal.

Eleven-Member Jury

Appellants contend that the trial court committed reversible error by excusing juror Suzanne Silver and continuing the trial with only eleven jurors. We disagree.

Two distinct provisions of the United States Constitution guarantee the right to a jury trial in criminal cases.[2] The Supreme Court declared in 1930 that the Constitution required a jury of precisely twelve persons unless this right was waived by defendant. *Patton v. United States*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930). The Federal Rules of Criminal Procedure, enacted in the 1940's, codified *Patton*'s requirement of twelve.[3] Our first inquiry thus must be whether Rule 23(b) has been followed here.[4]

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[2]U.S. Const. art. 3, § 2, cl. 3, provides: "The trial of all crimes . . . shall be by Jury . . . ." The sixth amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

[3]*See* Note of the Advisory Committee on Rules following Rule 23 in 18 U.S.C.A.

[4]Rule 23(b), Fed.R.Crim.P., reads as follows:

Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing

[footnote continued]

At a pretrial conference on June 3, 1974, attended by all counsel and appellant Spiegel, the question whether counsel and parties would be amenable to waiving the requirement of twelve jurors was first raised but not resolved. The jury was selected and sworn a week later, on June 10. After voir dire and before actual selection, all counsel for defendants stated, at side-bar, that their clients would waive the right to have twelve jurors.[5] Additionally, it was agreed at side-bar that two alternate jurors would be selected, despite the waiver, simply as a matter of preference. After a recess to discuss peremptory strikes and after the final selection, counsel for the government and for all defendants signed a written stipulation waiving the requirement of twelve jurors, and the trial judge announced in open court: "The court has received and approved the waiver of an alternate juror and the agreement to proceed with less than twelve in the event of necessity." There is nothing in the record to indicate conclusively that defense counsel conferred with their clients before signing the stipulation.

Soon after trial began, two jurors were excused, and the two alternates replaced them. Trial continued for approximately two more months. The government's case took seven weeks; defendants began theirs on August 5. Defendants wished to finish as soon as possible, since the jury was becoming restless and impatient. Defendant Spiegel was on the stand at the close of the

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with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences.

[5]There is some indication that the decision to waive was made in order to obtain five additional peremptory challenges.

day on Friday, August 9, his case complete except for cross-examination.

On Monday following the weekend recess, juror Silver did not report, owing to illness. Evidently the deputy clerk advised counsel of this new development before the judge entered the courtroom. On his arrival, the trial judge formally announced that juror Silver was ill, and he expressed uncertainty about when she would return. At that point, all defense counsel, in the presence of their clients, *requested* that trial continue with the remaining eleven jurors; government counsel objected. The trial court then excused the juror and stated in defendants' presence that trial would proceed with eleven. Again, it is difficult to ascertain whether appellants were consulted by their attorneys before the latter made their request to proceed. Much later, in overruling motions for new trial, the trial court stated that defendants "either knew actually the substance of their rights [to a twelve-person jury], or committed the entire decision without regard thereto to their attorneys." Thus, he made no explicit finding that defendants knew exactly what was being waived on either June 10 or August 12. Unquestionably, none gave personal assent in court to trial by eleven jurors.[6]

The real issue is whether Rule 23(b) allows counsel to waive a client's right to a jury of twelve in the absence of a finding that defendant either was consulted about

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[6]We wish to emphasize here that no one suggests that defendants were displeased with their counsels' decisions to agree in advance to trial by less than twelve jurors and to proceed with eleven on August 12. Indeed, some defendants seem to have expressed elation, off the record, over juror Silver's dismissal.

the decision or personally and intelligently assented to fewer than twelve.[7]

The language of Rule 23(b) departs substantially from that of Rule 23(a). The latter states:

> Trial by jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

Rule 23(b), on the other hand, refers not to "the defendant" but to "the parties."[8] Several courts apparently are reluctant to give meaning to this difference and require the express, knowing, intelligent, *personal* consent of defendant to a stipulation that trial may proceed with fewer than twelve jurors. *See United States v. Taylor*, 498 F.2d 390 (6th Cir. 1974); *United States v. Guerrero-Peralta*, 446 F.2d 876 (9th Cir. 1971). Another court holds that Rule 23(b) is satisfied if counsel is shown to have consulted with the defendant before agreeing to proceed with eleven jurors. *United States v. Vega*, 447 F.2d 698 (2d Cir.), *cert. denied*, 404 U.S. 1038, 92 S.Ct. 712, 30 L.Ed.2d 730 (1971). The Seventh Circuit, on the other hand, allowed counsel's signature on a stipulation consenting to fewer than twelve jurors to bind his client, despite the record's silence on the defendant's authorization or consent and even though counsel later objected to implementation of the stipulation. *United*

[7]The requirement of a writing in Rule 23(b) is not at issue here, since it is clear that a defendant's oral consent given in open court satisfies the rule even where its requirements are strictly enforced. *See United States v. Smith*, 523 F.2d 788 (5th Cir. 1975), *cert. denied*, 424 U.S. 973, 96 S.Ct. 1475, 47 L.Ed.2d 742 (1976); *United States v. Guerrero-Peralta*, 446 F.2d 876 (9th Cir. 1971).

[8]*See* note 3, *supra*.

States v. Pacente, 503 F.2d 543 (7th Cir.) (en banc), *cert. denied*, 419 U.S. 1048, 95 S.Ct. 623, 42 L.Ed.2d 642 (1974).

Precedent in our own circuit leaves us in some doubt as to which of the above lines of cases we should follow. In *Horne v. United States*, 264 F.2d 40 (5th Cir.), *cert. denied*, 360 U.S. 934, 79 S.Ct. 1460, 3 L.Ed.2d 1549 (1959), a collateral proceeding under 28 U.S.C. § 2255, defendant was held to have waived his right to twelve jurors through acts of his *counsel*, who first agreed to begin trial without alternate jurors, then stipulated in advance that the defense would be willing to proceed with fewer than twelve if any jurors became unable to continue, and finally agreed to the dismissal of a sick juror when the occasion in fact arose. The *Horne* court found no evidence of defendant's express consent to any of these actions by counsel but stated that defendant, although "unaware of the exact colloquy between Court and counsel, knew that the matter was discussed . . . and made no objection." *Id.* at 42. In those circumstances, which are very like ours here, the trial court "had every right to conclude that the action openly taken on both occasions by petitioner's counsel . . . was, as in the usual case, the act of petitioner." *Id.* at 43 (citations omitted).

This court in *Horne* reached the above holding with an eye toward both Rule 23(b) and *Patton*'s constitutional equation of "jury" with twelve persons. Thus, we can infer from *Horne* that a waiver made by counsel of the right to a twelve-person jury after intelligent and deliberate discussion in open court satisfies Rule 23(b) and passes constitutional muster.[9] This court later

[9]A recent development has, if anything, strengthened *Horne*'s holding. *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26

[footnote continued]

followed *Horne* without discussion in a direct appeal. *Beatty v. United States*, 377 F.2d 181 (5th Cir.), *rev'd on other grounds*, 389 U.S. 45, 88 S.Ct. 234, 19 L.Ed.2d 48 (1967).

Only our recent decision in *United States v. Smith*, 523 F.2d 788 (5th Cir. 1975), *cert. denied*, 424 U.S.

L.Ed.2d 446 (1970), in holding that the fourteenth amendment does not require *states* to provide twelve-person juries, cast doubt via broad dicta on whether the Constitution mandates twelve-person juries in federal court and perhaps overruled *Patton* sub silentio. Even if the number twelve is still constitutionally dictated, however, we find numerous circumstances in which actions by counsel to waive constitutional rights have bound their clients. *See, e.g., Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976) (waiver by counsel of fourteenth amendment guarantee that accused cannot be compelled to stand trial in prison garb); *Henry v. Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965) (deliberate choice by counsel to delay objection to tainted evidence may waive defendant's rights under the fourth amendment); *Winters v. Cook*, 489 F.2d 174 (5th Cir. 1973) (intentional, strategic waiver by counsel of defendant's right to object to racial composition of jury).

Winters relates a basic truth: we guard so zealously the right to counsel because

> most defendants are untutored in the law and are unqualified to conduct their own defense. It would be incongruous to reflexively allow a defendant such as Winters to void his conviction when his privately-employed lawyer did what he was retained to do—use his skill and knowledge of the law to further the best interests of his client—because the lawyer did not first reason out his every action with his client and obtain his knowing agreement.

Id. at 177-78. Only where there is evidence of fraud or gross incompetence by an attorney—which is not an issue here—or where "an inherently personal right of fundamental importance is involved," *id.* at 178, does the law require defendant to personally waive his or her rights. *Horne*, even before *Williams v. Florida*, indicated that defendants sometimes could speak through counsel in waiving the right to twelve-person juries. This is no way suggests that counsel may waive the right to a *jury trial* for their clients.

973, 96 S.Ct. 1475, 47 L.Ed.2d 742 (1976), stands in the way of our holding that the agreements entered into by counsel in this case satisfy Rule 23(b). *Smith* appears to require the express, personal consent of the defendant before a jury of less than twelve can convict; *i.e.*, the court followed the Ninth and Sixth Circuits. However, *Smith* overlooked *Beatty* and *Williams v. Florida* entirely, and *Horne*'s precedent apparently was thought not to be on point. *See* 523 F.2d at 791 n.1.

We are reluctant to find that *Smith*, through possible inadvertence or inadequate briefing, overruled *Horne* and *Beatty* sub silentio. Yet even if we assume that to be so, the facts of this case sufficiently distinguish it from *Smith* and require a finding of waiver. Appellants here affirmatively *sought*, as a matter of trial strategy, through counsel, the dismissal of juror Silver. In *Smith*, defense counsel and defendant seemed reluctant to implement the stipulation when the need for it arose; this court thus was forced to examine defendant's consent closely, since no strategy by defendant appeared to be involved. Counsel here made a tactical decision and urged it on the trial judge over the prosecution's protest; that conduct served to waive any objection the appellants might have had to proceeding with eleven jurors. We would also point out that, if we were to find the dismissal to be error under *Smith*, we would also be constrained to call it invited error. *See United States v. Lewis*, 524 F.2d 991 (5th Cir. 1975), *cert. denied*, 425 U.S. 938, 96 S.Ct. 1673, 48 L.Ed.2d 180 (1976).

Replacement of Two Jurors with Alternates

The government's voir dire questions failed to inquire whether any on the jury panel knew the defendants or their families. On June 11, 1974, the day after the

jury was sworn, the deputy clerk advised the trial judge that juror Helen McSwain had told him that she knew appellant Spiegel. The trial judge in turn announced this in open court; trial proceeded without objection. The next day, the arrival of Spiegel's family at court prompted juror McSwain to communicate directly with the trial judge at the noon recess concerning her relationship with the Spiegels. The judge then asked her in open court, out of the jury's presence, to relate her feelings about serving on the jury. She said that she knew the Spiegels and would rather not be on the jury since she would be uncomfortable making a decision in the case.[10] She testified that she had told other jurors of her acquaintanceship.

The court then questioned another juror, Harvey Jones, who stated that he had known Spiegel's daughter in college; he too, had mentioned that fact to other jurors.

The trial judge and counsel spent the afternoon of June 12 researching the proper course of action to take under the circumstances; then, and again the next day, they discussed the issues at length. At last the court excused McSwain because he believed her discomfort would render it difficult for her to be an impartial juror. Jones stated that his relationship with the daughter was not a close one, whereupon counsel for Spiegel informed the court that Jones in fact had dated Leslie Spiegel more than once. The court then excused Jones and replaced him and McSwain with two alternate jurors.

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[10] Further questioning by the trial court on June 13, after he excused her, brought out the fact that Ms. McSwain had been a close friend of Spiegel's daughter, Leslie, in junior high school and had been a guest in the Spiegel home.

Rule 24(c), Fed.R.Crim.P., governs a trial judge's action in such circumstances. It states in pertinent part:

> Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties.

It is clear that the court carefully considered the effect of the jurors' relationships with the Spiegels on their ability to remain impartial. The decisions of this court and other circuits indicate that Rule 24(c) empowers a trial judge, exercising sound discretion, to "remove a juror and replace him with an alternate juror whenever facts are presented which convince the trial judge that the juror's ability to perform his duty as a juror is impaired." *United States v. Smith*, 550 F.2d 277, 285 (5th Cir.), *cert. denied, sub nom. Wallace v. United States*, 434 U.S. 841, 98 S.Ct. 138, 54 L.Ed.2d 105 (1977) (quoting from *United States v. Cameron*, 464 F.2d 333, 335 (3d Cir. 1972); *see also, e.g., United States v. Brown*, 571 F.2d 980 (6th Cir. 1978); *United States v. Jones*, 534 F.2d 1344 (9th Cir. 1976); *United States v. Domenech*, 476 F.2d 1229 (2d Cir. 1973).

None of the cases cited above dealt with the situation presented with McSwain: excusal of a juror during trial for cause based on facts that would have been known before selection but for the *government's* omission of a question on voir dire.[11] Rule 24(c) does not explicitly require that jurors be retained in that circumstance,

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[11] Questioning of Jones on June 13 revealed that he was unaware that he knew anyone in the case until he saw defendant's daughter Leslie come into the courtroom the previous day. Thus, the government's failure at voir dire to inquire into the panel's knowledge of the defendants is irrelevant as it concerns juror Jones.

however, and we believe precedent indicates that the trial judge's discretion is broad enough to cover this case.

Assuming arguendo that the trial judge erred, at least in dismissing Jones, who insisted that his relationship with Leslie Spiegel would not prejudice his judgment,[12] we still must uphold the court's action absent a showing of prejudice to defendants in the substitution. *United States v. Bad Cob,* 560 F.2d 877 (8th Cir. 1977); *United States v. Floyd,* 496 F.2d 982 (2d Cir. 1974).

Counsel for defendants contended at trial, and renew the contention here, that dismissal of McSwain and Jones would prejudice the rest of the jury against defendants by causing the jury to believe the defense guilty of impropriety in not advising the court of the two jurors' knowledge of the Spiegels. In light of the fact that some jurors knew the reason for the substitutions, defense counsel requested that the jury be told that what had occurred did not reflect badly on the defense and that the replacement was due to prosecutorial error. Appellants also contend that the court should have questioned the rest of the jury about whether they had become prejudiced as a result of the replacements.

The trial judge must walk a tightrope in circumstances like these. Rule 24(c) requires the judge to remove jurors when it appears that they cannot perform their duties properly. If, as here, other jurors have some knowledge of what the problem is, the judge must somehow ascertain whether the panel is prejudiced without intimidating them or infecting them with erroneous impressions. We believe the trial court suc-

[12]Although Jones' lack of complete honesty probably led the judge, quite properly, to give little credibility to his protestations of fairness.

cessfully negotiated the tightrope here by his questions to the excused jurors and with his instruction:

> Ladies and gentlemen of the jury, two jurors, Mr. Jones and Ms. McSwain, brought to the Court's attention voluntarily and out of a regard for their oaths as jurors matters occurring– a situation affecting knowledge which came to their attention after the jury had been selected and we have excused them and placed the two alternate jurors in their place. The Court wishes to emphasize that what the two jurors did was with entire propriety and commendable and in accordance with their oaths as jurors and the Court knows that each of you jurors are equally faithful to your oaths as jurors.

A further instruction on defense propriety or prosecutorial omissions, or questioning of the panel, might have injected the very prejudice everyone sought to avoid. *See United States v. Brown,* 571 F.2d 980 (6th Cir. 1978).

We would also point out that the defense, concerned though it was over jury prejudice, failed when given an opportunity after the verdict to question jurors about the effects on them of the dismissal of the two jurors.[13] Thus, we must hold that the defense has failed to show prejudice to them, and we will presume none.

[13]When the trial judge declines to question jurors upon the replacement of one of their number with an alternate, defense counsel may always poll the jury after the verdict. *United States v. Brown, supra* at 990 & n.10. The trial judge, after the jury was polled and before it was dismissed, asked if counsel or the parties wished the court to undertake any further inquiry. From the silent record, we presume a negative answer.

Mann Charge

The trial judge gave an erroneous instruction to the jury; it read:

> Now it is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted and, *unless the contrary appears from the evidence,* you, the jury, may draw the inference that the accused whose case you are considering intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused. .

(emphasis added). We have condemned the use of the italicized words on numerous occasions, beginning with *Mann v. United States,* 319 F.2d 404 (5th Cir. 1963), *cert. denied,* 375 U.S. 986, 84 S.Ct. 520, 11 L.Ed.2d 474 (1964). The long history of some trial courts' continued use of the *Mann* charge, and our occasional affirmances despite it, are detailed in *United States v. Chiantese,* 560 F.2d 1244 (5th Cir. 1977) (en banc). In *Chiantese* we declared that we would no longer absolve such errors by looking at the whole charge to find corrective language. However, *Chiantese* is to be applied only prospectively, *id.* at 1256, and does not govern here.

Appellants make several arguments. First, they contend that *Sandstrom v. Montana,* ___ U.S. ___, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), establishes a constitutional rule against the use of this charge and thus requires us to apply *Chiantese* retroactively. Second, they maintain that a proper objection was made to the charge, rendering the "plain error" rule, Fed.R.Crim.P. 52(b), inapplicable. Last, they argue that even under pre-*Chiantese* law, the prejudicial language of the *Mann*

charge was not cured here by additional instructions, since the latter were not given immediately before or after the questioned paragraph.

We disapproved of the instruction at issue because it may operate to shift the burden of proof on the issue of criminal intent.[14] In June of this year, the United States Supreme Court declared that a burden-shifting charge intrudes on an accused's due-process right not to be convicted except on proof by the government beyond a reasonable doubt of every element of the crime charged. *Sandstrom v. Montana, supra.*

The charge used in *Sandstrom,* however, is distinguishable from that in the case before us. At issue in *Sandstrom* was whether defendant purposefully or knowingly killed another; the charge read: "*the law presumes* that a person intends the ordinary consequences of his voluntary acts." 99 S.Ct. at 2453 (emphasis added). Here the court merely informed the jury that they *might* infer intent from knowing acts; this is clearly correct. See the recommended instruction in *Chiantese,* 560 F.2d at 1255. The only phrase used here that was prohibited by *Chiantese* involves "unless the contrary appears from the evidence," and such a phrase was neither used nor discussed in *Sandstrom.* Thus, *Sandstrom* does not mandate a finding that the charge at issue is unconstitutional.

Even were we to assume that *Sandstrom* found constitutional deficiencies in all burden-shifting charges, we still would hesitate to, in effect, apply *Chiantese*

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[14] "When the words, 'so unless the contrary appears from the evidence' were introduced, the burden of proof was thereupon shifted from the prosecution to the defendant to prove lack of intent." *Mann, supra* at 409 (quoted in *Chiantese, supra* at 1246).

retroactively. The criteria to be used in deciding whether to apply retrospectively a new constitutional rule of criminal procedure are spelled out in *Adams v. Illinois*, 405 U.S. 278, 92 S.Ct. 916, 31 L.Ed.2d 202 (1972). Decisions defining fundamental rights often are given only prospective application; for example, the rule that requires the states to provide jury trials in serious criminal cases was not given retroactive effect, *see De Stefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.E.2d 1308 (1968); nor was the decision that established the right to counsel at a lineup, *see Foster v. California*, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969).

This court, sitting en banc, made the explicit decision *not* to apply *Chiantese* retroactively, even in the case then under scrutiny. In so doing, the en banc court weighed carefully the wisdom of retroactive application, including the effect of such on the orderly administration of justice, before deciding that the standards announced in *Chiantese* would take effect 90 days after the opinion's date. 560 F.2d at 1255. We see nothing in *Sandstrom* that requires us to abrogate that clear holding.[15]

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[15] We note that the Court in *Sandstrom* found that "the law presumes" charges might denote a conclusive or persuasion-shifting presumption, and a jury hearing such a charge might believe that they were directed to find against the defendant or that the defendant must negate criminal intent. ___ U.S. at ___-___, 99 S.Ct. at 2455-60, 61 L.Ed.2d at 45-51. The Court further held that these potential interpretations were not "cured" by other instructions on the presumption of the defendant's innocence and on the state's burden of proof. The Court reasoned that because a conclusive or burden-shifting presumption could be viewed as "a means by which proof beyond a reasonable doubt as to intent could be satisfied," the presumption was "not rhetorically inconsistent" with the more general instructions. *Id.* at

[footnote continued]

Before we proceed with our application of pre-*Chiantese* law, we must dispose of defendants' contention that the plain error rule is inapplicable. All briefs for

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___, 99 S.Ct. at 2456 n.7, 61 L.Ed.2d at 47 n.7. Thus, we might infer that *Sandstrom* in effect requires the prophylactic rule we laid down in *Chiantese*: that other instructions on the proper burden of proof will be disregarded if a *Mann* charge is given. 560 F.2d at 1255. If this inference is correct, several of our previous decisions, under which we decide this case, would not pass constitutional muster under *Sandstrom*. *See, e.g., United States v. Chiantese*, 582 F.2d 974 (5th Cir. 1978) (panel decision on remand from en banc consideration); *United States v. Duke*, 527 F.2d 386 (5th Cir. 1976). Or we might adopt a contrary inference, that "other instructions" that *are* "rhetorically inconsistent with a conclusive or burden-shifting presumption" can serve to cure it. *Sandstrom, supra* at ___, 99 S.Ct. at 2456 n.7, 61 L.Ed.2d at 47 n.7. The hair-splitting, case-by-case analysis that this would entail merely serves to emphasize the wisdom of *Chiantese*'s prophylactic rule.

But where, as here, the presumption at issue is not even arguably conclusive, we decline to find that the *Chiantese* rule is required by the Constitution. Notably, the Court in *Sandstrom* distinguished two lines of cases in which the undesirable effects of presumptions were ameliorated in part by general instructions similar to the ones found here. ___ U.S. at ___, 99 S.Ct. at 2457 n.9, 61 L.Ed.2d at 48 n.9. The court found that one line, culminating in *Ulster County Court v. Allen*, ___ U.S. ___, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979), did not involve "presumptions of the conclusive or persuasion-shifting variety," *Sandstrom, supra* at 2457 n.9, 61 L.Ed.2d at 48 n.9; the charge in *Allen*, however, placed at least as much of a burden on the defendant as the one at issue here. More significantly, the *Sandstrom* Court held that it was not bound by *Agnew v. United States*, 165 U.S. 36, 17 S.Ct. 235, 41 L.Ed. 624 (1897), in which the jury was charged that there was a presumption that required the defendant to prove his lack of intent beyond a reasonable doubt, in part on the ground that the jury was also expressly told that the presumption was not conclusive. Moreover, even if *Sandstrom* did require the *Chiantese* prophylactic rule, we would refuse to apply it retroactively for the reasons we have cited above. Thus, at least the pre-*Chiantese* decisions on curative instructions that involve nonconclusive *Mann*-type charges are controlling in this case.

appellants concede that no objection was made to the *Mann* charge. However, counsel at oral argument reversed position and argued that an objection was made.

The charge to the jury covers 54 pages of the transcript. Soon after the jury retired, counsel for some of the defendants attempted to object to an instruction that he believed placed the burden of proof on defendants, but he did not point with specificity to the portion of the charge he found objectionable, even when invited to do so by the trial judge.[16] In these circumstances, we cannot hold this nebulous complaint to be a proper objection. It is clear that the court below was more than willing to correct its mistake; it was counsels' duty to single out the erroneous language in order to facilitate its

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DEFENSE COUNSEL: The other position of the Court, I got the impression and I'm not sure—the Court at one time said—and I'm not sure—which was that the defendant had something to prove and I think the Court somewhat said to the jury that the defendant had some sort of burden to prove which was a particular position. I don't recall the exact wording.

THE COURT: If you could call my attention to it I would certainly change that. I thought I had said three times or four that the burden—that the defendant has no burden to produce any witnesses or do anything.

DEFENSE COUNSEL: I know. The Court has said that. But there was one place in the charge it indicated if you believe the defendant did this or that, then the defendant must prove it to you. And I thought it was putting the burden on the defendant.

THE COURT: If you will—

DEFENSE COUNSEL: I don't recall where—

THE COURT: If the statement was made it was inadvertent, but I don't know where it was made, but I would correct it.

DEFENSE COUNSEL: I do not know.

We assume arguendo that this "objection," if properly made, would preserve the error for all defendants.

correction. As it was, the judge was left unenlightened; therefore, the plain error rule applies. *See* Fed. R. Crim. P. 52(b).

Under pre-*Chiantese* law, we look to the whole set of instructions to determine whether the *Mann* charge could have misled the jury. Appellants emphasize that *United States v. Schilleci*, 545 F.2d 519 (5th Cir. 1977), found error because the instruction on the government's having the burden of proof did not follow the *Mann* language. We find *Schilleci* not controlling. In the first place, a charge emphasizing the government's burden does follow the *Mann*-type charge in the case at bar.[17] Similar corrective language also appears several times before the erroneous instruction.[18] Moreover, reliance on *Schilleci* is misplaced because reversal there was not based solely on an erroneous *Mann* charge.

On remand to the original panel, prejudice in the charge at issue in *Chiantese*, which was identical to the language used here, was found to be cured by proper instructions given before, but in close proximity, to the *Mann* charge. *United States v. Chiantese*, 582 F.2d at 976-77. We think the instructions here were at least as adequate as those in *Chiantese*.

The *Chiantese* II court also found ample evidence of objective conduct that would support a jury finding of

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[17]The *Mann* language is at 47 T. 45; the court stated at 47 T. 52:

[T]he burden is upon the Government to prove beyond a reasonable doubt the guilt of each defendant as to each count for which he is on trial before you and you must acquit—that is, find not guilty—each defendant as to each count where you find, if you do so, that the Government has failed to carry that burden of proof.

[18]The court properly instructed the jury regarding the burden of proof and the presumption of innocence.

intent despite an erroneous charge, *id.* at 977; we, too, find the evidence of objective conduct sufficient to sustain a guilty verdict despite the *Mann* language. The error made by the trial court is not plain error; thus, we must reject appellants' contentions regarding the court's charge.

The Trial Court's Grant, Then Denial, of Motion for New Trial

The post-verdict maneuvers in this case were protracted and complex. The verdicts came in on August 17, 1974. The trial judge allowed appellants to delay their filing of amplified motions for new trial until the lengthy transcript could be obtained from the court reporter; such motions finally were filed on June 11, 1976. More delay followed, during which evidence was heard on, among other things, the eleven-member jury issue. The court, on its own, discovered the first panel decision in *United States v. Chiantese,* 546 F.2d 135 (5th Cir. 1977), and granted appellants' motion for new trial on April 14, 1977, primarily on the eleven-juror issue but also because the first *Chiantese* opinion appeared to require automatic reversal for use of the *Mann* charge. See discussion above. The government filed a motion for reconsideration within seven days, although its brief in support was not forthcoming until May 26, 1977. Appellants contested this motion and complained of the untimely brief to no avail. The government's brief focused on the eleven-juror question and also informed the court that *Chiantese* had been granted rehearing en banc.

On June 8, 1977, the trial court granted the motion for reconsideration and vacated its previous order granting a new trial. After the en banc *Chiantese* decision in October, 560 F.2d 1244 (5th Cir. 1977), the court

overruled the motions for new trial. No judgment of conviction had been entered up to this time. Sentences were imposed in February 1978.

Appellants make alternate contentions: either the trial court lacked jurisdiction to impose sentences following its grant of new trial, or the court abused its discretion in vacating the order granting a new trial and deprived appellants of their due process rights to a speedy trial.

Cases are scarce that bear on the first contention, and none are directly apposite.[19] We held, in *United States v. Spinella,* 506 F.2d 426 (5th Cir. 1975), that once a second trial has begun the court has no power to vacate its order granting a new trial and reinstate the conviction obtained in the first trial. The government urges us to accept *Spinella*'s broad obverse, that the district court can alter new trial orders and revive convictions until jeopardy attaches in the second trial. Appellants, on the other hand, point to language in *Spinella* that states, "The order granting the new trial necessarily has the effect of vacating the *judgment of conviction* rendered in the earlier trial," *id.* at 430 (emphasis added); therefore, the trial court lacked power later to reinstate the judgment. *Id.* They ask us to hold that the order granting a new trial here rendered the *jury verdict* null and void, even though a judgment of conviction had never been entered and despite this case's other factual dissimilarities to *Spinella.*

We reject appellants' contention, yet we need not go as far as the government urges. Suffice it to say that on

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[19] *See United States v. Smith,* 331 U.S. 469, 67 S.Ct. 1330, 91 L.Ed. 1610 (1947), which holds only that the trial court may not grant a new trial after the court of appeals has affirmed a conviction on direct appeal.

these facts the trial court had jurisdiction to reconsider its grant of new trial. The government's motion for reconsideration was timely; while its brief was late under the local rules of the district, the court's failure to insist on compliance with such rules does not deprive it of jurisdiction. *See Schacht v. United States,* 398 U.S. 58, 64, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970) (untimely filing of petition for certiorari). Compliance is a matter for the court's discretion, which was not abused here. The *Chiantese* issue had not been briefed fully at the time the order granting a new trial was entered; that order did not vacate a judgment of conviction, and we hold that it did not render the jury verdict a nullity.

We find support in our holding from events transpiring after imposition of sentences. Appellant Spiegel petitioned us for mandamus on the ground that the trial court lacked jurisdiction to impose sentence. We denied his petition, *In re Stanley Spiegel,* No. 78-1764 (5th Cir., June 6, 1978) (unpublished), and the Supreme Court denied certiorari. *Spiegel v. Moye,* 439 U.S. 861, 99 S.Ct. 181, 58 L.Ed.2d 170 (1978).

Appellants' alternate contention based on abuse of discretion and violation of the right to a speedy trial fares no better. As we state above, the trial court acted within its discretion; the government's motion for reconsideration was granted within sixty days of the grant of new trial, and the grant of the government's motion served to toll the Speedy Trial Act, 18 U.S.C. § 3161(e) (Supp. V 1975).

We find no arguable merit in the other issues raised by appellants. Accordingly, we affirm the convictions below.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Gilbert F. Ganucheau
Clerk

Office of the Clerk
January 2, 1980

Tel.: (504) 589-6514
600 Camp Street
New Orleans, La. 70130

TO ALL PARTIES LISTED BELOW:

No. 78-5110

U.S.A. vs. Stanley Spiegel, Allen E. Perkins, and Allan Holloway

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Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
Gilbert F. Ganucheau, Clerk

By /s/ Claudia Rides
Deputy Clerk

cc: Messrs. Edward T. M. Garland
Mark J. Kadish
Messrs. J. Roger Thompson
Frank J. Petrella
Mr. William P. Gaffney

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
Atlanta Division

Criminal Action No. 27972

[Filed: April 14, 1977]

UNITED STATES

v.

STANLEY SPIEGEL, et al.

ORDER GRANTING NEW TRIAL

Defendants' motion for new trial is granted by reason only of the grounds relating to final decision by eleven jurors only. While there are substantial other issues raised, the Court would not grant a new trial on the basis of any one of them, but the Court must, of course, keep in mind that in the Court of Appeals, a ground for new trial, even though inadequate in itself, may have a tandem or enhancing effect. *U.S. v. Williams,* 523 F.2d 1203 (1975).

The case is declared on trial before this Court on Tuesday, May 24, 1977, at 10:00 a.m.

All parties and counsel are hereby directed to avoid and eliminate any conflicts as this case is governed by the Speedy Trial Act and must be tried expeditiously.

SO ORDERED, this 13th day of April, 1977.

/s/ Charles A. Moye, Jr.
United States District Judge

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
Atlanta Division

Criminal Action No. 27972

[Filed: Oct. 27, 1977]

UNITED STATES

v.

STANLEY SPIEGEL, et al.

ORDER OVERRULING MOTIONS
FOR NEW TRIAL

On April 13, 1977, this Court granted defendants' motions for new trial "by reason only of the grounds relating to final decision by eleven jurors only." The Court further stated: "While there are substantial other issues raised, the Court would not grant a new trial on the basis of any one of them, but the Court must, of course, keep in mind that in the Court of Appeals, a ground for new trial, even though inadequate in itself, may have a tandem or enhancing effect. *U.S. v. Williams,* 523 F.2d 1203 (1975)."

As subsequently indicated to the parties, the Court's concern in this area was its "Mann" type charge given in this case in 1974. This Court's charge had subsequently been considered, in 1976, by the Court of Appeals in *U.S. v. Duke,* 527 F.2d 386 (1976), where the charge was criticized, but the conviction affirmed.

However, in *U.S. v. Chiantese,* 546 F.2d 135 (January 28, 1977), the Court of Appeals so emphatically condemned the use of the Mann charge that it appeared to the Court that, despite the previous holding that this Court's use of the Mann charge in the context of the other instructions with which it was given did not constitute reversible error, nevertheless, it possibly might have been so held in this case if considered in conjunction with the 12-juror issue.

Upon the government's motion, this Court granted reconsideration and has received further extensive written and oral argument. The Court was also informed of the decision of the Court of Appeals to reconsider *Chiantese* en banc, and this order has been delayed [1439] pending receipt of the en banc decision in that case which, so far as this Court can tell, has prospective effect only.

The Court is now persuaded that decision by an eleven man jury was not error, and that a 12-man jury was properly waived, in the absence in this circuit of any requirement that the waiver be by the party only (not his attorney) and in written form, since this is a waiver of a statutory—not constitutional—right. However, the Court is further persuaded that the defendants either knew actually the substance of their rights, or committed the entire decision without regard thereto to their attorneys. What was lacking here was the element of allocution apparently required in another circuit.

The only other matter as to which a finding may be desirable is that defendants' lack of access to the contents of the so-called "white" box, for a limited period of time did not substantially impair their defense in this case, which finding the Court hereby makes.

For the above reasons, defendants' motions for new trial are OVERRULED and DENIED.

SO ORDERED, this 26th day of October, 1977.

/s/ Charles A. Moye, Jr.
United States District Judge

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Ben H. Carter, Clerk

By: /s/ Delores W. Page
Deputy Clerk

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Nos. 79-1184 and 79-1194

In the Supreme Court of the United States

OCTOBER TERM, 1979

ALLAN HOLLOWAY and ALLEN E. PERKINS,
PETITIONERS

v.

UNITED STATES OF AMERICA

STANLEY SPIEGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

KATHLEEN A. FELTON
Attorney
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (79-1184 Pet. App. 1a-24a) is reported at 604 F.2d 961.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1979. A petition for rehearing was denied on January 2, 1980 (Pet. App. 25a). The petition for a writ of certiorari in No. 79-1184 was filed on January 31, 1980, and the petition in No. 79-1194 was filed on February 1, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a written stipulation signed by all counsel and accepted by the district court validly waived petitioners' right to a 12-member jury under Fed. R. Crim. P. 23(b).

2. Whether the instructions to the jury on intent violated petitioners' due process rights.

3. Whether the district court lacked jurisdiction to enter a judgment of conviction and sentence petitioners, after the court granted a motion for a new trial and then vacated the new trial order in response to the government's timely motion for reconsideration.

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[1] Unless otherwise indicated, "Pet. App." refers to the appendix in No. 79-1184.

4. Whether the district court abused its discretion in substituting alternates for two jurors who were found to be acquainted with one of the defendants.

5. Whether the district court's deletion of the words "aiding and abetting" from the substantive mail fraud counts was an impermissible amendment of the indictment.

STATEMENT

After a nine-week jury trial in the United States District Court for the Northern District of Georgia, petitioners were convicted of mail fraud, in violation of 18 U.S.C. 1341. Petitioner Spiegel was convicted on 30 counts and was sentenced to six and one-half years' imprisonment, followed by five years' probation. Petitioner Holloway was convicted on 25 counts and was sentenced to five years' imprisonment, followed by five years' probation. Petitioner Perkins was convicted on one count and was sentenced to one year's imprisonment.[2] The court of appeals affirmed (Pet. App. 1a-24a).

1. Petitioners do not challenge the sufficiency of the evidence to support their convictions. Accordingly, we rely primarily on the summary of the 50-volume trial record in the opinion of the court of

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[2] All three petitioners were indicted, along with three other defendants, on 32 counts of mail fraud and one count of conspiracy to commit that offense, in violation of 18 U.S.C. 371. One defendant pleaded guilty to one count of mail fraud, and the other five proceeded to trial. Petitioners were acquitted on the conspiracy charge, and the two co-defendants were acquitted on all charges.

appeals (Pet. App. 2a-5a). Briefly, the government's evidence established that in October 1970 petitioner Spiegel acquired a controlling interest in a New York-based corporation, Coliseum Properties, Inc. (Coliseum). He then formed two subsidiaries of Coliseum, Leasing Corporation of America (Leasing) and Auditing Services, Inc. (Auditing), both with offices in Atlanta. Petitioner Holloway's firm, Holloway Enterprises, Inc. (HEI), contracted with Coliseum to sell franchises for both Auditing and Leasing (Pet. App. 3a).

The criminal activity involved the fraudulent sale of franchises to numerous purchasers throughout the United States. Leasing offered franchises to persons interested in entering the leasing business. Prospective dealers were told that they could offer to lease any income-producing equipment to businesses and industries in their territory. They were told that Leasing had a distinct competitive advantage because of its access to more than 200 sources of funding and that therefore Leasing dealers could offer more favorable lease terms than other leasing companies. A number of other promises were made as part of the sales pitch, and the names and telephone numbers of allegedly successful dealers were furnished to prospects. A total of 34 Leasing franchises were sold between December 1970 and December 1971, at $10,000 each. Of 137 lease applications submitted by dealers in 1971, only four leases were placed (Pet. App. 3a).

Auditing offered to conduct computerized audits of utility expenses incurred by businesses and industries. Under petitioners' scheme, Auditing dealers would solicit business customers whose past utility bills would then be audited for overcharges, computation errors, or other incorrect billing procedures. On the basis of such audits, prospective dealers were told, customers could expect to recover refunds for past inaccurate billings; in addition, Auditing would make recommendations for changes in service that would enable clients to save on future utility bills. Customers were to pay their Auditing dealer 50% of any refunds or savings realized as a result of the computerized audits and service recommendations; the dealer would then submit half his profits to Auditing. Prospective dealers were told that Auditing's computerized analyses would assure recoveries for a very high percentage of the customer accounts audited. It was claimed that the utility rates from each dealer's territory were programmed into Auditing's computer. Prospects were shown photographs of an RCA computer and were given the names and addresses of purportedly successful dealers. Sixty-two Auditing franchises were sold in 1971. Auditing's share of the franchise fees was more than $650,000, and HEI received more than $225,000. Although franchisees submitted numerous auditing contracts, very few recoveries ever occurred (Pet. App. 3a-4a).

Evidence showed that many of the representations made to franchise purchasers were false. Leasing

did not have the funding sources it claimed; letters from alleged sources were shown to have been falsified. Auditing never had the capacity to audit utility bills by computer; it used only about seven hours of computer time during a 10-week contract with a facility in Alabama. Moreover, petitioner Spiegel had been told by a computer expert that the rate structure of an entire utility company could not be programmed, and that billing analyses had to proceed one business at a time (Pet. App. 4a).

Petitioners Spiegel and Holloway were shown to have been directly involved in the fraudulent sales. Petitioner Perkins worked as a "singer" for both Leasing and Auditing, posing as a successful dealer and falsely claiming that he was receiving significant income from his "franchises" (Pet. App. 4a).

2. At a pretrial conference attended by all counsel and by petitioner Spiegel, the court raised the question whether all parties would waive their right to a jury of 12 (4 Tr. 50). No decision was reached at that time, and the court raised the matter again a week later, after voir dire and before the actual selection of jurors. In a side-bar conference, each defense attorney stated that his client would waive the requirement of 12 jurors (6 Tr. 120).[3] It was also agreed that two alternate jurors would be selected, notwithstanding the waiver (6 Tr. 122, 125).

[3] The transcript of the side-bar discussion indicates that defense counsel agreed to waive the requirement of 12 jurors in exchange for five additional preemptory challenges (6 Tr. 120, 122).

After selection of the jury, counsel for the government and for all the defendants signed a written stipulation waiving the requirement of 12 jurors (No. 79-1194 Pet. App. F-1), and the trial judge announced in open court that he had received and approved the written "agreement to proceed with less than twelve [jurors] in the event of necessity" (6 Tr. 133).

Soon after the trial began, two jurors were excused and were replaced by the two alternates (9 Tr. 20, 37). Near the end of the lengthy trial one of the remaining jurors became ill. When the juror did not report for duty on Monday of the trial's ninth week, all defense counsel asked, in the presence of their clients, that the juror be discharged and that the trial proceed with 11 jurors (44 Tr. 3). Over the government's objection, the district court excused the juror and explained to the jury, in the defendants' presence, that the trial would proceed with 11 jurors (44 Tr. 3-4, 9).

ARGUMENT

1. Petitioners contend (79-1194 Pet. 21-27) that their convictions should be reversed because they personally did not expressly consent on the record to a verdict by an 11-member jury.[4] Petitioners argue that the waiver in this case was made by counsel alone and that such a waiver cannot satisfy the requirements of the Sixth Amendment or Rule 23(b) of the Federal Rules of Criminal Procedure.

[4] Petitioners Holloway and Perkins have adopted the arguments raised by petitioner Spiegel (79-1184 Pet. 4).

Petitioners' argument begins with *Patton* v. *United States*, 281 U.S. 276 (1930), in which the question presented was whether a defendant can ever "waive [his] constitutional right to a trial by a jury of twelve persons." *Id.* at 287. This Court held that such a waiver is permissible (*id.* at 297, 305-308). The Court further stated in dictum that "before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant." *Id.* at 312. Several years after *Patton*, the permissibility of a waiver of the right to a 12-member jury was codified in Fed. R. Crim. P. 23(b), which provides:

> Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences.

Petitioners assert (79-1194 Pet. 22-23) that *Patton* required "the express and intelligent consent of the defendant" for a waiver of a jury of 12 and that that requirement has not been modified by subsequent developments. This contention is incorrect for two reasons. In the first place, the question of how a defendant's waiver must be manifested in order to be effective was not controverted in *Patton*. The Court's summary of the facts of the case (281 U.S. at 286-

287) leaves no doubt that the defendants, after consulting with counsel, personally agreed to continue the trial before the 11 jurors who remained after one was excused for illness. The Court's subsequent reference to the "express and intelligent consent of the defendant" as a prerequisite for an effective waiver was thus unnecessary to the decision, since there was no dispute that the defendants in *Patton* fulfilled all possible requirements on that score. Moreover, *Patton* was decided on the assumption that the Sixth Amendment right to a jury trial in criminal cases entailed a jury of 12. That assumption proved erroneous in *Williams* v. *Florida*, 399 U.S. 78, 86-103 (1970), in which the Court held that a 12-member panel is not a necessary ingredient of the trial by jury guaranteed by the Sixth Amendment.

Accordingly, since the decision in *Williams*, a defendant's right to a 12-person jury has only a statutory basis. In the federal system, that basis is Fed. R. Crim. P. 23(b). *United States* v. *Roby*, 592 F.2d 406, 408 (8th Cir.), cert. denied, 442 U.S. 944 (1979). *Patton's* reference to the "express and intelligent consent of the defendant" was not only unnecessary to the Court's decision but also a product of what we now know to be an ill-founded assumption that waiver of a 12-person jury relinquishes a constitutional right and therefore must meet a high standard of voluntariness. Since *Williams* v. *Florida*, *supra*, the propriety of a waiver of a 12-person jury in a federal criminal trial turns solely on the interpreta-

tion and application of Rule 23(b). No constitutional issue is involved.

Petitioners allege a conflict among the circuits as to the type of consent required by Rule 23(b) in order to effect a valid waiver (79-1194 Pet. 24-27). They assert that several courts of appeals have construed the words "parties may stipulate in writing" to mean that the Rule requires the express consent of the defendant himself in open court, regardless of any written or oral stipulation by defense counsel, while other courts have held that an agreement by counsel is enough to bind the defendant. In fact, however, whatever disagreement has developed among the courts of appeals regarding the interpretation of Rule 23(b) is not implicated in this case.

All the cases in which the courts have required the defendant's personal and express consent to a jury of less than 12 involved the lack of a written stipulation and therefore an apparent violation of the terms of Rule 23(b). The courts' inquiry in these cases focused on whether the purpose of the Rule might nevertheless be fulfilled, even in the absence of literal compliance with its terms. *United States* v. *Reyes*, 603 F.2d 69, 70, 71 (9th Cir. 1979); *United States* v. *Smith*, 523 F.2d 788, 791 (5th Cir. 1975), cert. denied, 424 U.S. 973 (1976) (written stipulation lost); *United States* v. *Taylor*, 498 F.2d 390, 391-392 (6th Cir. 1973); *United States* v. *Lane*, 479 F.2d 1134 (6th Cir.), cert. denied, 414 U.S. 861 (1973); *United States* v. *Ricks*, 475 F.2d 1326, 1327-

1328 (D.C. Cir. 1973); *United States* v. *Guerrero-Peralta*, 446 F.2d 876, 877 (9th Cir. 1971).[5]

The courts of appeals have uniformly held that, despite the language of the Rule, the stipulation need not be in writing to be effective, and that it is sufficient if the record adequately shows the defendant's consent to the agreement. *E.g.*, *United States* v. *Smith*, *supra*, 523 F.2d at 791; *United States* v. *Lane*, *supra*, 479 F.2d at 1136; *United States* v. *Ricks*, *supra*, 475 F.2d at 1328; *United States* v. *Guerrero-Peralta*, *supra*, 446 F.2d at 877; *Horne* v. *United States*, 264 F.2d 40, 43 (5th Cir.),

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[5] *United States* v. *Vega*, 447 F.2d 698 (2d Cir. 1971), cert. denied, 404 U.S. 1038 (1972), another case cited by petitioners (79-1194 Pet. App. I-1) as requiring the defendant's personal consent, did not actually state such a rule. Without discussing either the absence of a written stipulation or the specific kind of consent that must appear, the court found that Rule 23(b) was satisfied where counsel was shown to have consulted with his client before orally agreeing to proceed with 11 jurors. Similarly, *Fowler* v. *Hunter*, 164 F.2d 668 (10th Cir. 1947), held only that a stipulation by counsel, when agreed to by the defendant, is a valid waiver.

In *United States* v. *Virginia Erection Corp.*, 335 F.2d 868 (4th Cir. 1964), the court of appeals ruled that the district court erred in allowing *more* than 12 jurors to participate in deliberations; the court assumed in dictum (*id.* at 871) that a written stipulation by the parties in conformity with Rule 23(b) would be sufficient to effect a valid waiver of a jury of 12. And, in *United States* v. *Taylor*, 507 F.2d 166, 168 (5th Cir. 1975), the court of appeals simply did not address the question of how a defendant's consent to a jury of fewer than 12 must be manifested. In *Taylor*, there was no waiver at all, written or oral, by either counsel or the defendant himself; indeed, defense counsel vigorously objected when the district court decided to accept the verdict of 11 jurors.

cert. denied, 360 U.S. 934 (1959); see also *Williams* v. *United States*, 332 F.2d 36, 39 (7th Cir. 1964), cert. denied, 379 U.S. 976 (1965). The courts have reasoned that the purpose of the written stipulation requirement is to ensure that the defendant in fact consented to a trial and verdict by less than 12 jurors and that this purpose is satisfied whenever the record adequately demonstrates his consent. *E.g.*, *United States* v. *Guerrero-Peralta*, *supra*, 446 F.2d at 877.

The disagreement that has arisen under Rule 23 (b) concerns the kind of showing in the record that is sufficient to demonstrate the defendant's consent when there is no written stipulation. In those circumstances, some courts have held that the explicit consent of the defendant must appear in the record (*e.g.*, *United States* v. *Taylor*, *supra*; *United States* v. *Guerrero-Peralta*, *supra*), and others have accepted some indication of implied consent (*United States* v. *Roby*, *supra*, 592 F.2d at 408; *Williams* v. *United States*, *supra*; *Horne* v. *United States*, *supra*).

Here, however, a written stipulation was executed by counsel for all parties and accepted by the district court. Rule 23(b) was fully satisfied, and there is no need to inquire further into the quality of the defendants' consent. The formality of a written stipulation provides the best evidence of a defendant's consent. That is why Rule 23 provides in terms for waiver by written stipulation. The Rule does not require the defendant's own signature on

the stipulation. Indeed, the wording of subsection (b)—"the parties may stipulate"—contrasts with that of subdivision (a) of the same Rule, which provides that "the defendant" must waive in writing his right to a trial by jury.

In the only other case involving the question whether the defendant himself must sign the Rule 23(b) stipulation, *United States* v. *Pacente*, 503 F.2d 543 (7th Cir.) (en banc), cert. denied, 419 U.S. 1048 (1974), the court held that counsel's signature was enough to satisfy the Rule, without any other showing of the defendant's express consent. As the court of appeals stated in *Pacente* (*id.* at 552):

> Nothing in Rule 23(b) suggests that counsel's signature on a stipulation for a reduced size of jury does not bind the party he represents if the record fails to show that the party authorized counsel to stipulate.

While the record in this case fails to show the express personal consent of petitioners to the waiver agreed to by counsel, there is ample indication that petitioners were aware of and consented to their lawyer's action. The matter of the waiver was discussed in the presence of all defendants, acceptance by the trial judge of the written stipulation was announced in open court, and, at the time of the twelfth juror's dismissal, it was explained, again in open court and without objection from any defendant, that the trial would proceed with 11 jurors.

Moreover, as the court of appeals noted (Pet. App. 11a), defense counsel in this case affirmatively

sought, as a matter of trial strategy, the dismissal of the twelfth juror and pressed this course over the prosecution's objection. Petitioners cannot now maintain that their rights were not fully protected. See *United States* v. *Lewis*, 524 F.2d 991, 992 (5th Cir. 1975), cert. denied, 425 U.S. 938 (1976). In the circumstances of this case, both the literal terms of Rule 23(b) and its underlying purpose were fulfilled.

2. Petitioners also challenge the constitutionality of the district court's instructions to the jury on the question of intent (79-1194 Pet. 9-21). The court's charge included the following statement (47 Tr. 45; emphasis added):

> Now it is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted and, *unless the contrary appears from the evidence*, you, the jury, may draw the inference that the accused whose case you are considering intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.[6]

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[6] In addition to challenging the statement reproduced in the text, petitioners also assert that two additional portions of the court's instructions were erroneous. These portions of the charge (reprinted at 79-1194 Pet. 12) both concerned the presumption that every person knows what the law is, and they were both correct statements of the law. E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions* § 14.10 (3d ed. 1977).

Several courts of appeals, including the Fifth Circuit, have disapproved this so-called "Mann" charge (see *Mann* v. *United States*, 319 F.2d 404, 407 (5th Cir. 1963), cert. denied, 375 U.S. 986 (1964)), although they have generally found that other parts of the instructions to the jury cured the problem in individual cases. The courts have objected to the charge on the grounds that it may be interpreted by a jury to shift the burden of proof on criminal intent to the defendant. See, *e.g.*, *United States* v. *Garrett*, 574 F.2d 778 (3d Cir. 1978); *United States* v. *Chiantese*, 560 F.2d 1244 (5th Cir. 1977) (en banc); *United States* v. *Robinson*, 545 F.2d 301 (2d Cir. 1976); *United States* v. *Diggs*, 527 F.2d 509 (8th Cir. 1975); *Cohen* v. *United States*, 378 F.2d 751 (9th Cir.), cert. denied, 389 U.S. 897 (1967); *United States* v. *Releford*, 352 F.2d 36 (6th Cir. 1965), cert. denied, 382 U.S. 984 (1966). In its *en banc* ruling in *United States* v. *Chiantese*, *supra*, the Fifth Circuit held that, although the error of giving such an instruction would not automatically produce a reversal, it could not be cured in future cases by reference to correct statements elsewhere in the charge regarding the government's burden of proof. 560 F.2d at 1255. As the court of appeals panel in the present case noted (Pet. App. 19a, 21a), however, the *Chiantese* ruling was prospective only. Adhering to the procedure followed in *Chiantese* itself (see 582 F.2d 974 (5th Cir. 1978), cert. denied, 441 U.S. 922 (1979)), therefore, the panel reviewed the district court's instructions in their entirety. The

court ruled that, taken as a whole, the instructions were not misleading and that "the evidence of objective conduct [was] sufficient to sustain a guilty verdict despite the *Mann* language" (Pet. App. 21a, 22a).

Relying on *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), petitioners contend that their convictions cannot stand in the face of the improper instruction on intent. The instruction given in this case, however, was materially different from that condemned in *Sandstrom*. The charge in *Sandstrom* informed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." By contrast, the disputed instruction in this case was phrased in terms of a permissible inference. Notwithstanding petitioners' contention to the contrary, this difference in language is significant. The Court in *Sandstrom* stressed the particular danger of the "presumption" language used by the state trial court. The critical factor, in the Court's view, was that the jurors "were not told that they had a choice, or that they might infer that [a person intends the ordinary consequences of his voluntary acts]; they were told only that the law presumed it." 442 U.S. at 515. Moreover, the jurors in *Sandstrom* "were not told that the presumption could be rebutted, as the Montana Supreme Court held, by the defendant's simple presentation of 'some' evidence; nor even that it could be rebutted at all." *Id.* at 517. The Court concluded (*id.* at 517, 519; citation omitted): "Given the common definition of 'presume' as

'to suppose to be true without proof,' and given the lack of qualifying instructions as to the legal effect of the presumption, we cannot discount the possibility that the jury * * * could have given the presumption conclusive or persuasion-shifting effect * * *."

Thus, although the courts of appeals have also disapproved the use of an "inference unless contrary evidence" charge, it is only the "presumption" instruction that this Court has found so likely to mislead a jury that it violates the constitutional due process guarantee. The particular charge given here was not at issue in *Sandstrom* and was not discussed. Moreover, the defendant in *Sandstrom* presented a clear contemporaneous objection to the "presumption" instruction (442 U.S. at 513); by contrast, petitioners did not complain about the *Mann* charge at trial (Pet. App. 20a & n.16). They made only a vague general objection to "putting the burden on the defendant," and they did not identify specifically any allegedly erroneous portion of the instruction. Their objection on appeal therefore must be evaluated under the "plain error" standard of Fed. R. Crim. P. 52(a). See also Fed. R. Crim P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection"). In these circumstances, the court of appeals correctly held that *Sandstrom* "does not mandate a finding [of] * * * constitutional

deficiencies" in all potentially burden-shifting charges (Pet. App. 17a).

In addition, the *Sandstrom* decision is partially explained by the lack of any specific qualifying or curative instructions that would have ameliorated the effect of the trial judge's use of the "presumption" instruction. *Sandstrom* did not hold, as petitioners assert (79-1194 Pet. 14), that other portions of the charge cannot cure an erroneous instruction like the one given in that case. The Court's opinion said only that the very general additional instructions given there were not sufficient to remove the risk that the jury would regard the "presumption" instruction as either conclusive or "persuasion-shifting" (442 U.S. at 518 n.7).

Here, by contrast, the district court devoted a lengthy portion of its instructions to the issue of intent, emphasizing the jury's responsibility with regard to this aspect of the case. The jury was told repeatedly that the burden was always on the prosecution to prove each element beyond a reasonable doubt and that the defendant never had any "burden or duty of calling any witnesses or producing any evidence" (47 Tr. 15, 29, 34). The court explained that "[f]raudulent intent is not presumed or assumed" (47 Tr. 31), that "[s]pecific intent means more than the general intent to commit a crime or commit an act" (47 Tr. 42), that intent could be proved by circumstantial evidence, and that the jury could consider "any statements made or omitted or acts done or omitted by the defendent" as well as all

the surrounding facts and circumstances that might aid in their determination of his state of mind (47 Tr. 32, 42, 46-47). The objectionable phrase in the court's instructions was but one small part of a complete and careful exposition of how the jury should proceed in determining whether intent had been proved.

Considered as a whole (see *United States* v. *Park*, 421 U.S. 658, 674 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973)), the instructions clearly and adequately conveyed the nature of the government's burden of proof. The possibility that the jury was misled is negligible. Furthermore, in light of the en banc court of appeals' decision in *Chiantese*, it is unlikely that the instruction of which petitioners complain will be repeated in the Fifth Circuit, which has produced the bulk of litigation concerning the *Mann* charge.[7] At the very least, intervention by this

[7] Petitioners allege (79-1194 Pet. 17-18) that the Fifth Circuit decision in *Hammontree* v. *Phelps*, 605 F.2d 1371 (1979), conflicts with the court of appeals' ruling here. An intra-circuit conflict ordinarily does not constitute grounds for review in this Court (*Wisniewski* v. *United States*, 353 U.S. 901 (1957)), and, in any event, the cases are distinguishable. *Hammontree* involved a statutory presumption that was meant to be permissive only but that was found to have been erroneously interpreted as mandatory in the state trial court's instructions to the jury. In addition, the instructions as a whole were confusing in their juxtaposition of the notions of presumptive evidence against the defendant and the presumption of innocence. The trial court did not make clear that the defendant had no duty to present evidence in his favor and, in fact, the instruction may well have left the impression that the defendant was required to rebut the presumption against him. See 605 F.2d at 1379-1380.

Court is not warranted until it can be seen whether *Chiantese* is successful in producing its intended result of eliminating the *Mann* charge in the Fifth Circuit.

3. Petitioners contend that their due process and speedy trial rights were violated when the district court, before sentencing and judgment of conviction, granted and then denied a motion for a new trial (79-1194 Pet. 28-35).

Petitioners filed motions for a new trial shortly after the jury's verdicts were announced in August 1974. The district court permitted petitioners to delay the filing of amplified motions until a copy of the lengthy transcript could be obtained from the court reporter. Amended motions were finally filed in June 1976. On April 14, 1977, the district court granted a new trial. The court's order (Pet. App. 26a) stated:

> Defendants' motion for new trial is granted by reason only of the grounds relating to final decision by eleven jurors only. While there are substantial other issues raised, the Court would not grant a new trial on the basis of any one of them, but the Court must, of course, keep in mind that in the Court of Appeals, a ground for new trial, even though inadequate in itself, may have a tandem or enhancing effect. *United States* v. *Williams*, 523 F.2d 1203 (1975).

The court later revealed that, at the time it ordered a new trial, it had already discovered the panel's initial decision in *Chiantese* (546 F.2d 135 (5th Cir.

1977)), and it was concerned that its use of the *Mann* charge, "considered in conjunction with the 12-juror issue," might cause reversal (Pet. App. 29a). The government moved for reconsideration of the district court's new trial order and informed the court that the Fifth Circuit had decided to hear *Chiantese* en banc.

On June 8, 1977, the district court granted the motion for reconsideration and vacated its new trial order (79-1194 Pet. App. B-1). Several months later, after the en banc decision in *Chiantese*, the district court denied the motions for a new trial, stating that it was "persuaded that decision by an eleven man jury was not error, and that a 12-man jury was properly waived" (Pet. App. 29a). Petitioners were finally sentenced, and the judgment of conviction was entered, in February 1978. Petitioners appealed, and petitioner Spiegel also sought a writ of mandamus directing the district court to reinstate its new trial order and vacate his sentence. Spiegel argued that the district court lacked power to reconsider the new trial order, because that order rendered the jury verdict null and void and deprived the district court of jurisdiction to reinstate the verdict and impose sentence. The court of appeals denied mandamus (No. 78-1764, June 6, 1978), and this Court denied certiorari (439 U.S. 861 (1978)). Petitioners now repeat the same arguments advanced earlier by Spiegel in support of his request for mandamus. Although now advanced on direct review of petitioners' convictions, the arguments are no more persuasive

than before, and they do not merit further attention from this Court.

If the district court had entered a judgment of acquittal following the jury's verdict of guilty, the government could have appealed, and in the event of a reversal by the court of appeals, the jury verdict would have been reinstated. *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 570 (1977); *United States* v. *Wilson*, 420 U.S. 332, 344-345 (1975); *United States* v. *Jenkins*, 420 U.S. 358, 365 (1975). If entry of a judgment of acquittal does not render a jury verdict null and void, it follows *a fortiori* that an interlocutory order for a new trial, granted before any judgment of conviction was entered, should not invalidate the jury verdict.

Petitioners rely on language in *United States* v. *Spinella*, 506 F.2d 426, 430 (5th Cir. 1975), but that case does not support their argument. The court in *Spinella* held only that, once a trial has begun and jeopardy has attached, the district court does not have the power to vacate its new trial order and reinstate the original conviction. The court stated that the order granting a new trial operated to vacate the previous judgment of conviction; it did not say that the jury's verdict was rendered a nullity or that a court that has granted a new trial may not change its mind in response to a timely motion for reconsideration and enter a judgment of conviction on the outstanding verdict. In fact, the court in *Spinella* implied that a new trial order in a criminal case can be vacated at any time before the new

trial begins, just as may be done in a civil case (*ibid.*). At least where a timely request for reconsideration has been filed, this is a salutary rule, because it gives district courts an opportunity to correct their own errors and to avoid unnecessary expenditures of judicial resources. Cf. *United States* v. *Dieter*, 429 U.S. 6, 8 (1976); *United States* v. *Healy*, 376 U.S. 75, 80 (1964).[8]

4. Petitioners Holloway and Perkins raise two insubstantial claims not joined by petitioner Spiegel. They argue first (79-1184 Pet. 4-8) that the district court erred when it removed two jurors during the course of the trial and replaced them with alternates.

During voir dire, counsel for the government did not inquire whether anyone knew the defendants or their families. On the day after the jury was sworn, one of the jurors, Helen McSwain, informed a clerk that she was acquainted with petitioner Spiegel (7 Tr. 4). The trial judge informed counsel, and the trial proceeded without objection (7 Tr. 5). The next

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[8] Petitioners make much (79-1194 Pet. 34 n.7) of the government's failure timely to file its brief in support of its motion for reconsideration. But, as the court of appeals correctly noted (Pet. App. 24a), application of a court's local rules is a discretionary matter; the district court's failure to insist on full compliance with a rule does not deprive it of jurisdiction. *Schacht* v. *United States*, 398 U.S. 58, 64 (1970).

As to petitioners' speedy trial claim (79-1194 Pet. 34), the court of appeals correctly held that the Speedy Trial Act, 18 U.S.C. 3161(e), was tolled by the granting of the government's motion for reconsideration before the expiration of 60 days from the date of the order granting a new trial (Pet. App. 24a). Accordingly, the Act was not violated.

day, juror McSwain communicated directly with the trial judge and explained her discomfort at serving on the jury because of her relationship with the Spiegel family (8 Tr. 127-128). Another juror, Harvey Jones, informed the court that he too knew the Spiegels (8 Tr. 130-131). The court questioned both jurors individually (9 Tr. 11-13, 28-30, 34). Both said they thought they could still render an impartial verdict, but McSwain continued to express her reluctance to remain on the jury. It also became known that Jones had dated Spiegel's daughter several times (*ibid.*). After extensive discussion of the situation with all counsel, the court concluded that both jurors would have difficulty remaining impartial. The court therefore excused Jones and McSwain and replaced them with alternates (9 Tr. 10-11, 36-37).

Courts have consistently held that under Rule 24(c) of the Federal Rules of Criminal Procedure, the district court has broad discretion to replace a juror "whenever facts are presented which convince the trial judge that the juror's ability to perform his duty as a juror is impaired." *United States* v. *Cameron*, 464 F.2d 333, 335 (3d Cir. 1972). The district court's action should not be disturbed on appeal absent a clear showing of abuse of discretion or prejudice to the defendant. *E.g.*, *United States* v. *Brown*, 571 F.2d 980, 985, 991 (6th Cir. 1978); *United States* v. *Smith*, 550 F.2d 277, 285 (5th Cir.), cert. denied, 434 U.S. 841 (1977); *United States* v. *Floyd*, 496 F.2d 982, 990 (2d Cir.), cert. denied, 419 U.S. 1069 (1974).

The court of appeals correctly ruled that the district court acted well within its discretion in this case (Pet. App. 11a-15a). The record demonstrates that the court carefully considered the effect of the jurors' relationship with the Spiegels on their ability to remain unbiased. McSwain was admittedly troubled about remaining on the jury, and Jones not only had a previous relationship with Spiegel's daughter but apparently had been less than candid in explaining his past acquaintance with the Spiegel family to the court. Under these circumstances, the court did not act arbitrarily in determining that these jurors could not view the case impartially.

The record contains no evidence that the replacement of Jones and McSwain had any prejudicial effect on the remaining jurors. The court questioned the two discharged jurors and found no indication that they had influenced the rest of the jury in any way (9 Tr. 15-18, 38, 48). The court also instructed the jury that no misconduct was involved in the dismissal of the two jurors and that they had acted with complete propriety (9 Tr. 49-50).

Petitioners argue that the government waived any objection to juror McSwain by failing to question her on voir dire about her knowledge of the defendants and that the court's *sua sponte* action was therefore improper.[9] This contention misconstrues Rule

[9] Jones explained that he was unaware that he knew anyone in the case until he saw petitioner Spiegel's daughter

24(c). Substitution of alternate jurors is the prerogative of the court and does not require the consent of any party. *United States* v. *Brown*, *supra*, 571 F.2d at 985; *United States* v. *Florea*, 541 F.2d 568, 573 (6th Cir. 1976), cert. denied, 430 U.S. 945 (1977); *United States* v. *Floyd*, *supra*, 496 F.2d at 990. *United States* v. *Goldberg*, 330 F.2d 30 (3d Cir.), cert. denied, 377 U.S. 953 (1964), on which petitioners rely, is not to the contrary. The court of appeals in *Goldberg* held that Rule 24(c) does not prevent the replacement of a juror when the reason for his disability existed at the time of his selection and went undiscovered until some time later. The court mentioned the power of both defense and prosecution to waive a challenge to a juror, but it nowhere suggested that such a waiver would prevent the court from acting on its own motion. *Id.* at 43. There is thus no conflict to resolve between *Goldberg* and the present case.[10]

5. Finally, petitioners Holloway and Perkins allege (79-1184 Pet. 8-11) that the district court impermissibly amended the indictment when it struck the words "aided and abetted" from the substantive mail fraud counts (48 Tr. 13-15). This contention is untenable.

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enter the courtroom after the start of the trial (9 Tr. 29). A government inquiry on voir dire concerning the prospective jurors' acquaintance with anyone in the case would therefore not have revealed Jones' past relationship with Spiegel.

[10] Petitioners allege a violation of their Sixth Amendment rights as well as a violation of Rule 24(c), but they cite no authority for the proposition that the substitution of jurors accomplished here amounted to constitutional error.

While the general rule is that an indictment may not be amended (*Ex parte Bain*, 121 U.S. 1 (1887)), the federal courts uniformly permit amendments when the effect is to withdraw one or more of the charges against the defendant. See *Salinger* v. *United States*, 272 U.S. 542, 548-549 (1926); *United States* v. *Prior*, 546 F.2d 1254, 1257 (5th Cir. 1977); *United States* v. *Holt*, 529 F.2d 981 (4th Cir. 1975); *United States* v. *Cirami*, 510 F.2d 69 (2d Cir.), cert. denied, 421 U.S. 964 (1975); *United States* v. *Dawson*, 516 F.2d 796 (9th Cir.), cert. denied, 423 U.S. 855 (1975). The court's action here could only have benefited petitioners, as they obviously realized when they accepted the deletion without objection (48 Tr. 14-15).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

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